



07 JUL 2010

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In re Application of:  
MEYER, ROMAN et al : DECISION  
Application No.: 10/583,415 :  
PCT Application No.: PCT/DE2004/002778 :  
Int. Filing Date: 20 December 2004 : UNDER  
Priority Date: 20 December 2003 :  
Atty Docket No.: DEBE:067US :  
For: ENDOTOXIN DETECTION METHOD : 37 CFR § 1.137(a)

This is in response to applicants' "PETITION FOR REVIVAL OF AN APPLICATION FOR PATENT ABANDONED UNAVOIDABLY UNDER 37 CFR 1.137(a) and RESPONSE TO NOTIFICATION OF ABANDONMENT MAILED DECEMBER 30, 2009" filed on 27 January 2010, which request the Notification of Abandonment be withdrawn.

### BACKGROUND

On 20 December 2004, applicants submitted international application PCT/DE2004/002778, which claimed priority to a prior application filed 20 December 2003.

On 15 June 2006, applicants filed a submission for entry into the national stage in the United States, which was accompanied by, *inter alia*, a preliminary amendment to the specification and the claims. The papers were assigned U.S. application number 10/583,415.

On 02 September 2008, The United States national stage office (DO/EO/US) mailed a "NOTIFICATION OF MISSING REQUIREMENTS UNDER 35 U.S.C. 371 IN THE UNITED STATES DESIGNATED/ELECTED OFFICE (Form DO/EO/905) informing applicants of the need to provide a signed oath or declaration of the inventors, in compliance with 37 CFR

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1.497(a) and (b), identifying the application by the international application number and international filing date. The notification also requires a sequence listing in computer readable form.

On 31 October 2008, applicants filed a response to the Notification. The response included a transmittal letter, substitute sequence listing in .txt format, and an executed declaration.

On 02 June 2009, the DO/EO/US mailed a Notification of Defective Response (Form PCT/DO/EO/916) indicating the sequence listing was defective.

On 24 June 2009, applicants filed a response to the Notification. The response included another copy of the sequence listing in .txt format.

On 14 July 2009, the DO/EO/US mailed a second Notification of Defective Response (Form PCT/DO/EO/916) instead of Notification of Abandonment indicating the sequence listing was again defective.

On 24 September 2009, the DO/EO/US mailed a Notification of Abandonment (Form PCT/DO/EO/909).

On 13 November 2009, applicants filed a petition under 37 CFR 1.181 and a new sequence listing file.

On 08 December 2009, the petition was dismissed as applicants had failed to timely file a properly reply to the Notification of Defective Response mailed 02 June 2009.

On 30 December 2009, a second Notification of Abandonment (Form PCT/DO/EO/909) was mailed.

On 27 January 2010, applicants filed the present petition to revive the application.

## DISCUSSION

37 CFR 1.137(a) provides that:

If the delay in reply by applicant or patent owner was unavoidable, a petition may be filed pursuant to this paragraph to revive an abandoned application, a reexamination prosecution terminated under §§ 1.550(d) or 1.957(b) or limited under § 1.957(c), or a lapsed patent. A grantable petition pursuant to this paragraph must be accompanied by:

- (1) The reply required to the outstanding Office action or notice, unless previously filed;

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- (2) The petition fee as set forth in § 1.17(l);
- (3) A showing to the satisfaction of the Director that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable; and
- (4) Any terminal disclaimer (and fee as set forth in § 1.20(d)) required pursuant to paragraph (d) of this section.

Regarding 37 CFR 1.137(a)(1), applicants have provided the required reply.

Regarding 37 CFR 1.137(a)(2), the \$270 petition fee will be charged to Deposit Account No. 50-1212 as authorized by the applicants.

Regarding 37 CFR 1.137(a)(3), applicants attribute the delay in filing the correct sequence listing due to applicants' representative was misinformed regarding the need for correcting the warning messages.

“Unavoidable Delay”, provides that a delay resulting from the lack of knowledge or improper application of the patent statute, rules of practice or the MPEP does not constitute “unavoidable” delay, See *Haines*, 673 F. Supp. at 317, 5 USPQ2d at 1132; *Vincent v. Mossinghoff*, 230 USPQ 621,624 (D.D.C. 1985); *Smith v. Diamond*, 209 USPQ 1091 (D.D.C. 1981); *Potter v. Dann*, 201 USPQ 574 (D.D.C. 1978); *Ex Parte Murray*, 1891 Dec. Comm'r Pat. 130, 131 (1891).

Thus, applicants' apparent lack of knowledge or a misunderstanding regarding correction of sequence listing procedures is not a sufficient reason for relief under 37 CFR 1.137(a).

Petitioner may wish to consider filing a petition for relief under 37 CFR 1.137(b). This should not be construed as an indication that such petition under 37 CFR 1.137(b) will be granted as a matter of course.

With regard to item (4), because the international application was filed after 08 June 1995, no terminal disclaimer is required.

## CONCLUSION

For the reasons detailed above, applicants' petition under 37 CFR 1.137(a) is **DISMISSED**, without prejudice.

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If reconsideration on the merits of this petition is desired, a proper response must be filed within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136 are available. Any reconsideration request should include a cover letter entitled "Renewed Petition Under 37 CFR 1.137(a)." No additional petition fee is required.

Any further correspondence with respect to this matter may be filed electronically via EFS-Web selecting the document description "Petition for review and processing by the PCT Legal Office" or by mail addressed to Mail Stop PCT, Commissioner for Patents, Office of PCT Legal Administration, P.O. Box 1450, Alexandria, Virginia 22313-1450, with the contents of the letter marked to the attention of the Office of PCT Legal Administration.



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